IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

EDDINGSTON, et al. Plaintiffs, v. UBS FINANCIAL SERVICES, INC. Defendants.	)( )( )( )( )( )(	Case No. 2:12-cv-00422 MARSHALL, TEXAS May 28, 2013 10:00 a.m.
HENDRICKS, et al. Plaintiffs, v. UBS FINANCIAL SERVICES, INC. Defendants.	)( )( )( )( )( )(	Case No. 2:12-cv-00606 MARSHALL, TEXAS May 28, 2013 10:00 a.m.

MOTIONS HEARING
BEFORE THE HONORABLE ROY PAYNE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: (See sign-in sheet.)

FOR THE DEFENDANTS: (See sign-in sheet.)

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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

I N D E X

May 28, 2013

THE COURT: For the record, we're here for the hearings in the matters of Eddingston and Hendricks versus UBS which are 2:12-422 and 2:12-606 on our docket.

Would counsel state their appearances for the record?

MR. ANDERSON: Yes, Your Honor. My name is Ted Anderson and with me today is Sam Baxter. We are here on behalf of the plaintiffs in both cases.

THE COURT: All right. Thank you, Mr. Anderson.

MR. SMITH: And, Your Honor, for the defendant UBS, Michael Smith, and from the Gibson Dunn firm Mr. Paul Blankenstein --

MR. BLANKENSTEIN: Good morning, Your Honor.

THE COURT: Good morning.

MR. SMITH: -- and Mr. Eugene Scalia.

THE COURT: Good morning.

MR. SCALIA: Good morning, Your Honor.

THE COURT: Thank you, Mr. Smith.

I am aware of two motions that are on our agenda this morning, those being the motion to compel and the motion to strike. Are there other items that anybody wants to have taken up today; if so, I'd just like to get out a listing of what it is that we'll take up and then

we'll take things up in order.

Anything else for the plaintiffs?

MR. ANDERSON: No, Your Honor.

THE COURT: All right. And for the defense?

MR. SCALIA: Your Honor, I think from our perspective it would be helpful to achieve some sort of understanding about how the hearing scheduled for next Tuesday will be conducted. We've had some preliminary discussions with plaintiffs' counsel as to whether, for example, we'd expect to have any witnesses personally present, that sort of thing.

THE COURT: I appreciate that, Mr. Scalia. I would also like to go over that so I'll know what to expect; so, after we address the motions, we'll address the manner in which we'll approach the hearing, also.

Let me see. I don't know if there's any particular order that the parties want to proceed in, but unless the parties feel differently, the motion to compel was the first filed of the two and I guess I will start with that.

MR. SCALIA: Thank you, Your Honor. Again, Eugene Scalia representing the defendant UBS Financial Services. We've moved to compel answers in both cases to interrogatories number 2, 4, 11, and 12. And 2 and 4 sort

of come as a pair and then 11 and 12 as well. Our concern with 2 and 4 is those were fairly standard interrogatories asking the plaintiffs to identify who had relevant facts regarding the case and what those facts were, and in the case of interrogatory 4, to identify the content of certain conversations that occurred. There's been some supplementation over the course of our attempt to resolve this without bringing this matter to Your Honor, but we're still of the view that we've been given incomplete information. And so to take one example -- and I'll try to put it on the screen for you.

THE COURT: That would be helpful.

MR. SCALIA: These are the first amended interrogatory responses by Mr. Stacy. And incidentally, Your Honor, the parties reached a stipulation that in this case the deposition testimony of Stacy and Eddingston would be reflective of all witnesses' testimony on the plaintiffs side in both cases.

THE COURT: I saw that in the briefs.

MR. SCALIA: So as you see here, I have marked on the side. There are several places where there are just generalized statements made that there are people out there, either potentially known to the plaintiff or known to the plaintiffs' counsel, who could have information related to the claims, but those people are

not identified. And so we think it's fairly elementary that its plaintiffs' obligation to provide the information with -- in their own knowledge or that's possessed by their lawyers that relates to the claims. And again, I've identified three different places there.

With respect to interrogatory 4 -- interrogatory 3, it asked about conversations that they had had. On interrogatory 4 was a follow-up to that asking for the content of those conversations, what they said, what the other person said. They acknowledged in response to interrogatory number 3 having discussions with -- among fellow plaintiffs, but in 4 they don't tell us what was said. There's no privilege objection raised or anything of that nature. They just don't give the information. So, those are 2 and 4, Your Honor.

THE COURT: I was under the impression from your brief that 4 asked the plaintiffs to identify each person from UBS who either individually or as part of a group communicated with you. Is that...

MR. SCALIA: That's -- that's -- that's correct. That's what 4 asks. And they acknowledge in response their discussions among fellow plaintiffs.

THE COURT: But you're -- you're saying that 4 asks for the content of certain communications?

MR. SCALIA: That's right. 4 says what the

individual said about the plan and what statements, if any, you made during the communication. But 4 -- their answer to 4 doesn't provide that information for reasons that they haven't explained.

THE COURT: All right. I guess that just wasn't in the -- the part of 4 that was quoted in the brief, so I --

MR. SCALIA: I apologize, Your Honor.

THE COURT: That's not a problem.

Let me ask you just for a moment to help me understand how that information relates to the certification issues. Because while certainly I understand that the scope of discovery itself is broad, our real purpose here now is to deal with the discovery that's necessary for next week's hearing, and so tie that in for me, if you would.

MR. SCALIA: With respect to interrogatory 2, we've had reason to believe that some people might even try to have appear as witnesses to provide evidence by declaration, would be captured by number 2, and yet wouldn't be disclosed to us. And, in fact, it turns out there are two people on their witness list, Neustadt and Eldermire, whom we've told them we object to precisely because we didn't get their names in response to interrogatories.

But there's more than that, Your Honor. And if I could take a moment to give that context.

THE COURT: All right.

MR. SCALIA: We believe that their testimony is relevant, among others things, as to whether they viewed this PartnerPlus Plan, which they're claiming they lost benefits under, whether they viewed that as a retirement plan. So statements they would have made to one another would tell whether or not it's a retirement plan. Now, then the question is why does that matter.

And, Your Honor, if I could bring you back to the hearing on the motion to compel arbitration, you may remember there that the plaintiffs said we can't be compelled to arbitrate because PartnerPlus is an ERISA plan, and the arbitration agreement is in another document, and you can't amend an ERISA plan without jumping through the right hoops. And they said UBS didn't jump through those hoops, and so those arbitration agreements that are outside the ERISA plan don't work. That was their argument.

And, Your Honor, for purposes of that motion, you accepted that argument and you said you might be required to revisit it at a later point, but you accepted the pleading, allegation, the complaint and the like.

There's been actually, Your Honor, there has been a change that we didn't discover until I guess it was Sunday morning in deposition the plaintiffs are taking in this case. We had expected that their position would be that for the same reason the arbitration agreements couldn't be considered, so also the class waiver agreement couldn't be considered because we thought they'd say, you know, this is an ERISA plan. There is a class waiver, which we talk about in our brief, which is independent and separate from the arbitration agreement. And they said to you on the motion to compel arbitration, well, the FINRA rules govern arbitration here. Of course, now we have a different issue. We're in court; we're not seeking arbitration. Instead the question is can that case proceed in court as a class or did they waive that. And we think it's crystal clear that they waived it. They waived the right to proceed as a class action, and we have anticipated that they, Your Honor, would present to you the same argument regarding their class waiver that they did regarding arbitration; namely, PartnerPlus is an ERISA plan. So we have viewed whether they themselves have talked about it as an ERISA plan as, you know, very important to our saying you're wrong, PartnerPlus is not an ERISA plan, and therefore, those waivers are valid. Whether those waivers are valid goes directly to whether

this class can be certified. Because, of course, if they waive the ability to proceed as a class, then there's no certification.

The change, Your Honor, which we discovered Sunday morning, is that plaintiffs aren't making the argument that they persuaded you before. Nowhere in their briefs have they stepped up and said PartnerPlus is an ERISA plan and, therefore, it can't be amended or in conflict with another document on the ground that it's an ERISA plan. They haven't made that argument at all. They're not defending the position they put forward to you before, instead they're -- they've waived that issue, as far as we can tell, and are no longer trying to argue at this stage the class shouldn't be certified because PartnerPlus, supposedly being an ERISA plan, would stand in the way of -- of the class waiver agreements.

THE COURT: Now, are you suggesting that they will tell me in a moment that they no longer contend this is an ERISA plan?

MR. SCALIA: I'm not --

THE COURT: Because I can find out the answer to that very quickly.

MR. SCALIA: I'm not that optimistic, but I -- here's what I think they can't tell you. I don't think they can tell you that in either of the two briefs

they've filed they've said the class waiver is invalid because PartnerPlus is ERISA plan. In fact, they've said the opposite. They've said you shouldn't address that question at this stage, and they have not raised that defense to the enforceability of their waiver. Instead they've made only one argument, which is that the compensation plan which embodies the class waiver agreement, they've said, oh, that's a summary brochure. It doesn't really do anything. And in any event, it's intention with PartnerPlus.

THE COURT: Take me back to how this relates to whether this discovery is aimed at certification issues or not.

MR. SCALIA: They've moved to compel class certification, and we've said it's improper, among other reasons, because you waived the ability to proceed as a class. I don't think they'll disagree whether they waived to proceed as a class is fundamental to addressing the question of whether they can get that class certified.

In the past, they've said as well that that waiver is ineffectual because this is an ERISA plan. They haven't said we're dropping our ERISA count, but they've said purely for purposes of the waiver it -- the arbitration agreement itself, what they told you was we can't be forced to arbitrate. Because this is an ERISA

plan, you can't amend it. Now they're not making that argument. The argument on which they won the motion to compel arbitration they're not making. So, very long way of saying, Your Honor, we admit the ground has changed a little bit from when we filed our motion to compel.

We still think this information is relevant, although we do acknowledge that as relates to this discovery they have not presented in their papers the what I'll call ERISA defense to the enforceability of their class waiver. Now, they may stand up and say we agree with Mr. Scalia. I would expect they will because their papers pretty clearly don't present that argument.

Regardless of what they, our position to you next week will be they waived it. And they have only one objection to our class waiver. But, you know, whether they'll disagree they waived or not we'll see in a moment.

THE COURT: And -- all right. Given that waiver is an issue for certification, if we go there, how do these interrogatories tie back into whether they've waived?

MR. SCALIA: If they're going to make their ERISA defense to the enforceability of that waiver, they're going to say, well, that waiver doesn't work because PartnerPlus was an ERISA plan, and you can't amend ERISA plan without jumping through the right hoops. If

they're going to make that argument, we have two responses, Your Honor. First, you waived it. And I've already talked about that. But our second is it is an ERISA -- I'm sorry -- it's not an ERISA plan anyway, and the manner in which the plaintiffs have spoken among themselves about it is relevant, we think, to establishing whether or not it's an ERISA plan. And then, of course, on interrogatory 2 I already mentioned they are particular people they've even put on their witness list.

THE COURT: Well, are you suggesting that if the plaintiffs among themselves have said, gosh, I don't think this is an ERISA plan, that that would matter?

MR. SCALIA: I -- I think it would, Your Honor. We think this plan very clearly is for purposes of motivating and retaining current employees. The vast majority of money paid out under this plan is to current employees. Very little is paid out to people who are over retirement age.

THE COURT: And I understand that has to do with your issue about whether this is designed for retirement or designed for retention. That doesn't have anything to do with whether the plaintiffs have talked about the plan being covered by ERISA. I mean, most lawyers could not have a meaningful discussion of whether this plan is covered by ERISA let alone non-lawyers. I

don't follow you why it would matter whether they thought it was or didn't. I mean, surely you're not suggesting that they can get up and testify that, no, we don't think it's covered by ERISA and that I'll -- I'll be expected to put some weight on that.

MR. SCALIA: I don't think they're likely to have used that word. But retirement money, deferred compensation, I think it's highly likely that this plan was spoken about as a form of deferred compensation among the plaintiffs and the people who worked at UBS, not as a retirement plan. In fact, you know, they've, with their papers, sought to put in evidence that they spoke among themselves about how it was for retirement. That evidence is pretty weak.

Your Honor, I think it helps as well to turn to interrogatories 11 and 12.

THE COURT: Okay.

MR. SCALIA: Those are in a way related again to whether this is a deferred compensation plan or whether it's a retirement plan, but it also relates to damages issues. The way things work in this industry is if you have deferred compensation and you will lose it by going to a competitor because of a non-competition agreement, you're highly likely to get made whole by your new employer. You'll say to the new employer, Here's the

deferred comp that I will lose if I come to you because I've got a non-competition agreement, and that new employer will say, Well, we'll give you a forgivable loan.

So, for example -- and I'm not going to use names because some material is under seal, but one of the plaintiffs left about $300,000 on the table in deferred compensation but got a forgivable loan of $1.6 million. That was to make that person whole for deferred comp and that whole constellation, that -- that transaction reflects that UBS has this plan to keep people and its competitors have alternative compensation strategies to lure them away nonetheless. That is part of how business is done in this industry. And interrogatories 11 and 12 go to showing that it was as a form of deferred compensation that this was viewed and treated not as retirement money.

Finally, on 11 -- 11 and 12, it's relevant as well to damages. Just, for example, on the state law claim, obviously they had a duty to mitigate damages. They did. They got -- one of them got $2.8 million as a forgivable loan, signing bonus. We finally learned that after pressing hard on these interrogatory responses. That person didn't have more than I think it was $800,000 in deferred compensation that he might have lost at UBS.

So, they had a duty to mitigate damages,

and we think that evidence shows that they did and then some. And to the extent they didn't, well, that just goes to commonality and it goes to how the individualized nature of this case is going to end up dominating over common issues. So that's the other reason that 11 and 12 are important to us on the damages front.

THE COURT: Well, what is there that you can't present at the certification hearing without getting that discovery? It sounds to me like you are articulating your -- your argument fully as far as how Rule 23 will treat this situation of whether or not it affects commonality without getting discovery from all of their current or subsequent employers.

MR. SCALIA: Fair question. One concern we have is with the two witnesses that I mentioned, Eldermire and Neustadt. If we were to have a hearing Tuesday with live witnesses and those folks would show up, we have an objection to that -- we've expressed it to them -- because they weren't previously identified in response to 2.

One other concrete example, Your Honor, Mr. Hendricks hasn't provided us any information regarding numbers 11 or 12. We have reason to believe that he also is likely to have gotten a very large signing bonus or forgivable loan. He's the lead plaintiff in one of the two cases, but we haven't been given the information on

him. There's information we haven't gotten under 11 and 12 to date, but -- but I would call that out as an example.

What -- let me confess the following. First of all, I think it's well within their means to give us this information this week; but secondly, if it weren't, we're still prepared to go forward in response to that question you posed, Your Honor.

THE COURT: All right. The discovery is certainly quite a lot broader than just this issue about whether they received a signing bonus. You've asked for a lot more information than just that from -- about their subsequent employers.

MR. SCALIA: We have, Your Honor. We think that there are, potentially, mechanisms other than simply a signing bonus by which they would have been made whole for the money that was, you know, supposedly left on the table at UBS.

THE COURT: You know, I can see, even without hearing any argument about it, that there are, I'm sure, going to be issues about whether or not any signing bonus they may have gotten is something that UBS could properly take a credit for against any liability that it might have regarding the deferred compensation. And obviously, there would be questions that seem apparent

about what -- what the intent was of that signing bonus, whether that was simply to lure the employee or whether it was actually formally designated as some kind of offset for whatever they left behind.

But do you have authority for the proposition that in a case like this that signing bonus would be something that would be deemed to mitigate their damages?

MR. SCALIA: I believe that in our supplemental brief we cited case law regarding mitigation generally. Your Honor, in my mind, there's no doubt that if I'm claiming I was harmed because I refused to sign a non-compete and lost some money, but then the place that I went to work instead gave me money that either directly or indirectly was intended to mitigate the loss that I'd suffered, to me it's self-evident that that's mitigating money that's received.

Now, as to whether they'll say, "Well, no, it was done for a different purpose," one of our experts says, "No. In fact, the way things work in this industry is indeed that you need to offer substantial deferred comp to keep people, to retain them precisely because your competitors are going to be out there in the field offering signing bonuses and the like." So that's a dynamic that exists in the industry. But I think it's

fairly well indisputable -- our expert testified to it, I believe, but I'll confess I'm not certain -- that at least one of the plaintiffs in deposition acknowledged that what he was owed by UBS was a factor in determining the signing bonus. If I'm wrong about that, I'll correct it when I stand up again, Your Honor.

THE COURT: Why isn't what a subsequent employer gives a collateral source to you, why -- why would UBS be able to take credit for that if they are otherwise legally liable to the plaintiffs?

MR. SCALIA: We wouldn't claim it as a collateral source but rather that the plaintiffs, you know, as in any, you know, contract-type dispute, or tort dispute for that matter, have a duty to mitigate damages. And to the extent that they were indeed able to go to new employers and persuade them that they needed additional compensation up front in order to make them whole, then that reduces their injury.

And the Supreme Court just last month in the Comcast case was, you know, very clear that if there are individualized questions of damages, that can prevent class certification. And so again, to the extent the plaintiffs want to say, "Oh, no. I received a substantial signing bonus because, you know, I have family illness" or something like that, we're confident that is not going to

be the case for other class members. And so you have a destruction of common -- commonality; and for 23 -- 23(b)(3) purposes you have a predominance problem.

Your Honor, to come back to the question you posed, if the plaintiffs were going to say, "We're putting on no plaintiff testimony we're putting on no testimony by other third parties to the effect that we viewed this as a retirement plan," then again, I'd concede that this discovery we're arguing about right here on this particular motion does become less important to us than it otherwise would be.

THE COURT: Well, it's -- I'm still back on this issue about the relevance of the -- of the subsequent employment because it's not at all apparent to me that this is like a claim for lost wages where if they receive subsequent wages, that that would obviously reduce their claim for lost wages. And I -- I don't doubt that you've got authority for the proposition, which is obviously true, that every plaintiff has a duty to mitigate their damages. But what I'm wondering is whether you've got authority that you can site for the proposition that these payments from a subsequent employer do reduce the obligation owed by someone in the position at UBS.

MR. SCALIA: With respect to the state claim, Your Honor --

THE COURT: Okay.

MR. SCALIA: -- plaintiffs will only reach that if they first establish that these are not retirement benefits at issue; instead, if they've lost on that ground and they're now arguing this was compensation.

You referred to lost wages, Your Honor. I'm not aware of any legal principle that would say that if there's bonus compensation or other incentive compensation, there can't be mitigation if that's lost, but there is mitigation that's lost wages. You have to mitigate lost wages as you've noted, Your Honor. I don't believe they can give any basis in the law why it would be any different to other forms of compensation apart from wages.

THE COURT: Well, I think their contention is that they've already earned this compensation that they're seeking from UBS. Wouldn't you agree that that's their contention?

MR. SCALIA: Yes, that's their -- their contention, Your Honor.

THE COURT: So how would anything they do subsequent to their employment affect that claim?

MR. SCALIA: Because if there's a practice in the industry of people who have been able -- who have not been paid certain wages which they've earned, being

able nonetheless to mitigate that through payment by a subsequent employer, then I think again you have a clear mitigation circumstance. Remember, Your Honor, this is a dynamic circumstance where these people are being recruited away from UBS. The reason that this money is being lost to them in some circumstances is precisely because somebody came to them and said, "I have a better deal to offer you."

And that person -- you know, these are very sophisticated people. I've told you about the kinds of money that some of them are making, never mind the kinds of money they're advising people on. They're making an economic calculus. They're not leaving UBS to make less money. What they're recognizing is they're going to make more that more than makes up for what they'll lose under the compensation plan; so, it's a classic case of their making an economically rational decision that also mitigates the loss that they would have as to the deferred compensation.

THE COURT: Well, as to whether or not you've got any authority from a court in another case saying that because the former employee went out and received a signing bonus or some other form of compensation, they're not entitled to the deferred compensation they're seeking, I take it you don't?

MR. SCALIA: Your Honor, I don't have what I can cite to at this moment. I certainly will review our papers, which are already before you, to see if we give it to you there and be prepared to address it again next -- next Tuesday.

THE COURT: It's certainly not in the motion to compel papers, and I have not studied the certification briefing yet. Are you suggesting it may be there?

MR. SCALIA: It may be; I'm not sure. And I've gingerly been attempting to look at my brief while speaking with you, Your Honor, which is always something to be done advisedly, and that may be the reason I haven't been successful in finding that case for you, but --

THE COURT: Well, I'll give you the chance to do that in a moment while I'm talking to plaintiffs' counsel. But I guess my -- my primary concern with your motion to compel is trying to figure out what you really need in the way of further answers to these interrogatories in order to properly present what you need for next week. Because I'll just say, I do anticipate giving the plaintiffs as well as the defendant the opportunity to call live witnesses, so that -- that's something that you should know is -- is possible. I'm not going to order them to, but, I mean, that's one of the

reasons we set the hearing is so that they can.

So, if you can identify for me what further responses you think you need in order to be prepared for that, I'll focus on those with the plaintiff.

MR. SCALIA: Your Honor, I think that one is the information regarding Mr. Hendricks compensation when he went to his new employer, which I think was Wells Fargo. That hasn't been provided to us. Three of the six did receive very substantial forgivable loans. We don't know about Hendricks.

And then with respect to unidentified witnesses, what I would say is that our principle concern at this point is that two people are put on the witness list who were plainly responsive to interrogatory number 2. For that reason we've told the plaintiffs that we object to their being called as witnesses since they were identified at such a late date to us.

THE COURT: And give me their names one more time.

MR. SCALIA: Neustadt and Eldermire.

THE COURT: Okay.

MR. SCALIA: And if I could add a third thing, Your Honor. If indeed it is the plaintiffs' intent to take the stand next week and testify to conversations they supposedly had about how they regard this as a

requirement benefit, and we do think it's highly improper that they refuse to answer this interrogatory number 4 or for that matter, decline to respond to 11 and 12, which again we think is information that shows not just mitigation but we also think it's relevant to showing that in a sort of vernacular the financial advisor's business, these compensation plans are, in fact, reviewed as -- viewed as deferred comp, something that's a present expectancy rather than retirement money, and that's why it's a subject of negotiation when people are looking to go from one firm to another.

THE COURT: Okay. Thank you, Mr. Scalia.

MR. SCALIA: Thank you, Your Honor.

MR. ANDERSON: Your Honor, Ted Anderson on behalf of the plaintiffs. In response to the motion to compel that has been filed and argued by the defendants in the case, I'd like to just point out -- make a couple of points here with regard to some of the argument that I've heard. With regard to the statement that they have never heard of Mr. Eldermire and Mr. Neustadt, looking at the plaintiff Bill Hendricks' first amended answers to first and second interrogatories and the response to -- let's see here -- No. 10 that I'll put up on the screen -- I'm sorry. I'm a page short -- we do disclose Mr. Neustadt and Mr. Eldermire.

But I think it -- the real point is how is any of this relevant or even discoverable under the circumstances. We bent over backwards to try to give the defendants information that they've requested, but frankly, it appears to us that this is a classic textbook case for class certification, Your Honor, and the defendants have been reduced to efforts to try to create new law in order to create certification -- issues on certification in order to avoid it. And primary among all of that is their attempt to inject merits issues on whether or not the ERISA plan -- whether the PartnerPlus Plan is an ERISA plan, and so most of the discovery that they are seeking here goes to that issue.

With regard to this issue of whether or not there is mitigation involved, our claim is that there was a forfeiture. And our claim is not that there is some lost future wages that mitigation would be applied against. As the Court undoubtedly knows, when you are looking at an employment case, the duty to mitigate applies against future wages.

And so, for example, if employee A was terminated on January 1, he has a duty to go out and get another job and generate wages, and those new wages would be applied against the future wages that that employee would -- damages claim the employee would have under the

circumstances. That is not the issue here. Here we're talking about a forfeiture, here we're talking about wages that were already earned under the circumstances, and this is just a red herring that they're throwing in the -- into the proceeding to try to confuse the issues.

In addition, with regard to this argument that they have received some kind of a bonus, there's no evidence that any of the plaintiffs received a bonus. What they get is a loan for a certain amount, and the loan is tied to the book of business that the employee can allegedly generate when they go to the new -- to the new job. It doesn't have anything to do with the forfeiture under the circumstances; so, there's just no relevance to any of the discovery that they're requesting here under the circumstances. And so we have amended a number of times to try to meet their complaints, but it just -- it just seems like we're drilling down on -- on merits issues that are outside the scope of class action discovery.

THE COURT: And tell me for what purpose you would expect to call Mr. Neustadt and Mr. Eldermire.

MR. ANDERSON: It would probably be -- it depends upon the issues that are raised really by the defendants, Your Honor. The -- the problem that I have and we're -- and I hope that we get to this in my motion to strike their expert -- is they have decided that

they're going to go and try to -- to litigate the merits of whether or not the PartnerPlus Plan is an ERISA plan at the class certification stage. And so if that is -- if that is the issue and they are trying to somehow or other make an argument that there was no time ever that it was ever communicated to the class that the PartnerPlus Plan was a plan that was designed for retirement, then it would be rebuttal for that under the circumstances.

And it's -- and as you see from the declarations that we've added to our motion for class certification are -- plaintiffs address that issue as well. But the problem is this is the class certification stage; this isn't the merit stage. And I just -- you know, they have made the same objection in discovery requests that we've made, and so as they continue to kind of move down this path to try to inject merits issues into the class certification, you know, we're -- we're amassing the evidence that we may have to rebut it. But I have to be candid with the Court. If -- if this is going to be a merits issue, we're going to need six months of discovery because the issue of whether or not the PartnerPlus Plan is a retirement plan under ERISA, you have to look -- you have to litigate the facts and circumstances surrounding the operation of that plan. And that is going to entail dozens of depositions, hundreds of thousands of pages of

documents, and I just don't think that this is the appropriate time to litigate that, Your Honor.

THE COURT: All right. The -- one of the categories that Mr. Scalia talked about needing was information about conversations that you might provide testimony about. You heard that portion of his argument, I'm sure. Do you intend to offer such testimony at the hearing?

MR. ANDERSON: Only if it's -- if it's in rebuttal to points that are made by the defendants in the case, Your Honor. At this point, we don't anticipate calling any witnesses at the class cert hearing. We would just offer the declarations that we have and the deposition testimony that's available to all the parties; but otherwise at this point, we don't intend to call any of them live.

But, you know, they've got these experts that are -- that are going to testify on the merits of whether or not the PartnerPlus Plan is an ERISA plan, and that is a big, big issue. That's what this case is all about. And they're trying to get to the ultimate issue basically after giving us two weeks' worth of documents in the case, and so we're -- we're trying to, you know, maintain our options under the circumstances, but I think that this case could -- I think class cert can be decided

on the declarations and the deposition testimony that's already been taken.

THE COURT: All right. Well, thank you, then, Mr. Anderson. And we'll take up your motion to strike as soon as we finish with this motion.

MR. ANDERSON: Yes, Your Honor.

THE COURT: Mr. Scalia, from what I saw in the record, reading the briefs on this motion and looking at the various iterations that the plaintiffs have provided of responses to date, I -- I am not convinced that there is anything further in the discovery that you need in order to be prepared for class certification. I -- I understand it can be a difficult line to draw between the merits and certification issues, but I have not seen anything that I think is necessary for you to address the Rule 23 issues that will be up for consideration next week. This is -- I'll give you the last word if -- if you think there's something else that would change that impression.

MR. SCALIA: Briefly, Your Honor. Mr. Anderson referred to UBS injecting the merits issues and suggested the merits issues can never be addressed at the class certification stage. Obviously, that latter proposition is simply wrong. The Supreme Court has now been clear time and again that when certification issues

are intertwined with merits issues, the Court can and indeed must get to the merits questions.

Now, with respect to his saying that UBS has interjected the merits question of whether this is an ERISA plan into the case at this stage, it's actually the plaintiffs, Your Honor, who, in avoiding arbitration, insisted that the Court reach a decision and rule that PartnerPlus was an ERISA plan. Now, they -- as I mentioned before, they seem to have waived that position for purposes of this new issue on the class waiver. I didn't hear anything to the contrary now, but the fact remains it was plaintiffs.

MR. ANDERSON: Judge, for the record, I -- I do dispute that allegation. I just want to make sure that's of record, and I'm sorry to interrupt.

THE COURT: All right. The record will reflect your position.

But go ahead.

MR. SCALIA: Which reflects as well, Your Honor, that it's not defendants who have put that issue in; it's plaintiffs who are trying to put it in. Now they didn't raise it in their briefs. It's not there anywhere that this class waiver is unenforceable because PartnerPlus is an ERISA. They have clearly waived that. That will be our position a week from now. But they're

not willing to concede right now that they're not putting the ARISA'ness of this plan forward, so they're just not in a position to tell you that evidence regarding whether or not it's an ERISA plan is irrelevant. If they're going to try to resist the class waiver on the ground that PartnerPlus is an ERISA plan, then we're back to talking about whether it's an ERISA plan, but the Court won't be able to simply go on the allegations of the complaint as -- as the Court did before.

They propounded extensive discovery on UBS. Thousands of documents have been produced. They took the deposition of a very senior executive at UBS regarding the purported retirement futures of the plan; so, that's been two ways. Again, I've been clear enough that we view it as waived and we'll take that position, but, at the same time, we obviously need to protect ourselves by being prepared to put evidence in.

There was a reference by Mr. Anderson to submitting deposition testimony. We don't believe they've identified any deposition excerpts for use at the hearing; so, I'm not sure what he was referring to. But, you know, obviously to the extent that they intend to do that, we need advance notice and some ability to respond to that as well.

THE COURT: All right. Well, at this time

I'm going to deny the motion to compel. I'm not ruling that you're not entitled to further discovery as the case progresses, but I'm going to deny the motion with respect to the upcoming hearing. So, thank you.

And I will -- I will just say for the record that I am not at all disputing that there are merits issues that have to be considered within the context of this class certification issue. The question where I may differ from you is to whether the merits issues should be decided at this point. The fact that they're in the case is something that relates to the way Rule 23 applies to this case and whether Rule -- whether a class action is manageable, superior and otherwise appropriate device.

But determining those merits issues at this stage I think is not appropriate, and that's -- that may be where you and I would depart. But in any event, you'll have an opportunity, as will the plaintiffs, to put all of those positions out and -- and then we'll take up certification in light of that.

Anyway, thank you, Mr. Scalia.

MR. SCALIA: Thank you, Your Honor.

THE COURT: Mr. Anderson, let's turn to your motion to strike.

MR. ANDERSON: Yes, sir.

THE COURT: And I will say I've read the briefs on that and I have some initial impressions that I want to provide you so that you can clarify for me what your position is on them. The first thing is it's -- it is my understanding from the motion that the expert designations by the defense were made on a timely basis under the docket control order issued in February and that the issue is whether or not the supporting documents or underlying documents relied upon by those experts were timely disclosed.

And is that correct, you're not contending you didn't get the expert reports themselves on time?

MR. ANDERSON: That is -- yes, Your Honor, that -- that is correct. We did receive the report in a timely fashion -- the reports in a timely fashion.

THE COURT: And I'm sure, obviously, you saw the law that they cited in their opposition brief to the effect that there is no requirement that the documents relied upon by the expert actually be produced at the same time as the report. How do you respond to that?

MR. ANDERSON: Well, Judge, they -- the defendants have an ongoing obligation to produce relevant documentation at all times. And to the extent that -- and typically what happens when we file expert reports is all of the information that the expert report is based upon is

evidence that has already been -- or discovery that has been fully disclosed and vetted, so there's no surprise as to new documentation. Or under the circumstances here, the first time that we saw -- well, here, the information that their accounting expert has based her opinion upon is information that came from Deloitte and another consulting firm, and none of that information had been produced in -- in general class action discovery in this case. And --

THE COURT: Well, have there been initial disclosures in this case? I -- it's not my impression that -- that we have kicked off this case as we would an individual action by requiring initial disclosures and opening discovery.

MR. ANDERSON: We have not, Judge. But we have not had general -- we haven't made requests for disclosures, and we haven't had general merits discovery in the case.

THE COURT: So where is this obligation you're referring to coming from?

MR. ANDERSON: Well, in my opinion, it comes from our document request that we served upon them. And I'll -- let me pull this out for you. Let's see.

Okay. Your Honor, the -- the plaintiffs made a discovery request in this case. It's Plaintiffs' First Request for Production of Documents to Defendant UBS

Financial Services. And we received --

THE COURT: When did you propound that?

MR. ANDERSON: It was prior to the expert report. And -- and what I have in front of me, Your Honor, is their response which is dated March 19, 2013. So this is -- it was before March 19th, 2013, and I have their response from March 19, 2 -- 2013.

And in our request, we requested a number of things, Your Honor. 1 is, "All documents evidencing the amounts of any forfeitures referred to in request for production number 1." Okay?

Now, clearly, the information that their accountant has relied upon is documentation that refers to forfeitures, because her opinion is basically that the -- the amount forfeited is something that is -- is tracked with Deloitte and with this other consulting firm, and that information was what she relied upon in giving her opinions.

And the response is, "Since discovery at this time is, by Court order, limited to issues pertaining to plaintiffs' pending motion for class certification, defendant objects to the request as unnecessarily burdensome. As the amount of forfeitures is not relevant, it would not lead to the discovery of information that would be relevant to any issue under Federal Rules of

Civil Procedure 23."

If you then go to our request number 5, we say, "All documents relating to any contention by defendant that the PartnerPlus Plan for financial advisors is not subject to the Employee Retirement Income Security Act or to its minimum vesting, anti-forfeiture and separate funding provisions." Which is the exact opinion that both of their experts have opined upon.

And their response is, "Defendant objects to the request for production number 5 on the grounds that it's premature as such contention discovery is inappropriate at this early stage of discovery."

So, they are telling us that that evidence, those -- that discovery -- the very discovery on which these expert opinions are based is not relevant, and they withheld the documents under that objection. They go on to say, "Defendant further objects to the request to the extent it seeks information or communications protected by attorney -- the attorney/client work product privilege." And we have yet to receive the privilege.

So, that is the -- that was the pending requests that we had to them. They are making objections, basically, that the contention as to whether or not the PartnerPlus Plan is an ERISA plan is not relevant at this early stage, and then on the date of filing expert

opinions, they spring upon us these two experts that give the very opinion that the ERISA plan -- that the PartnerPlus Plan is not an ERISA plan based upon documents that they never produced to us. And so they can't have it both ways, Your Honor. Either we're going to get into the merits of discovery, and if we are, we're going to have to get -- we're going to need an extension of time to get, you know, appropriate discovery so that we can meet the opinions that are being offered; or, they can stand on the objections they made here, but they can't have it both ways.

THE COURT: All right. Let me hear from Mr. Scalia in response to your argument.

MR. SCALIA: Your Honor, your initial questions regarding the timeliness of the reports and -- regarding the reports compliance with the Rule 26 expert requirements, with all respect, I think those are the dispositive questions here. We complied with our obligations under the order that plaintiffs decided not to move forward with experts. They're obviously very troubled by these reports.

Incidentally, Mr. Anderson himself brought to your attention discovery they propounded seeking our documents relating to the ERISA question. And as I said, we produced thousands of those. We put a senior executive

in deposition so they could ask him about those documents. In fact, we accelerated the production and produced documents, including this underlying data, before it was even due under the requests.

Mr. Anderson then pivoted and spoke to you about two different document requests that I don't believe he even raised in his motion to strike. He suggested, first of all, that this information is responsive to their initial document requests and then he turned to their -- I believe to their second document request. As he noted, though, we objected to their first document request. However, as to questions 1 and 2, which is the ones he focused on, the number of people, the amounts of forfeiture, Your Honor, we gave them that information.

My colleague, Paul Blankenstein, who's with me here sent an e-mail --

Paul, if you can hand it to me.

-- to Mr. Goodman, lead counsel for the plaintiffs, giving him that information. And I believe that --

THE COURT: When was that?

MR. SMITH: That e-mail was April 10th.

THE COURT: And was the information that was provided April 10 the same information that your experts relied upon in -- in their opinion?

MR. SMITH: No, it wasn't, Your Honor. But it was the information that -- as we read the interrogatories -- or the production requests -- had been called for at that time, the number of participants, the amounts of forfeiture. The key thing is they never filed a motion on their first discovery requests. We're not here today on a motion under those first discovery requests. And as to their second discovery requests, we provided the data that is at issue, Your Honor, before our responses were due under those second discovery requests.

THE COURT: Well, let me just take up one thing that appeared to me to be the case from Mr. Anderson's presentation, and that is that they asked in their request for production number 2, I believe, for documents supporting the proposition that the plan is not subject to ERISA.

MR. ANDERSON: That's number -- that's number 5, Your Honor, and I can give you a copy of our --

THE COURT: Okay. And your response to that was that that's not an appropriate issue for this stage of the case. Is that right so far?

MR. SCALIA: We raised that objection, but, Your Honor, again, as I mentioned, we've submitted thousands of pages of documentation due to subsequent meet and confers over that request. And -- and on April 19th,

Mr. Stris, one of their lawyers, wrote us about that particular request. He didn't talk about this data that were at issue now. He says the response to request for production number 5 is particularly troubling. And when you look at that, what he's focused on was this is not the request that ultimately is the one that focused on the underlying data. There were other requests they focused in a -- that they propounded in discovery, served that same day. April 19th they served new requests. Those new requests were specific about the data. We then provided the data again on an accelerated time table. But neither this first request nor the second request was either the basis for their motion. They've now conceded our expert disclosures were proper, and they've, I think, backed off their claim that we had any general Rule 26 obligation to update. So what they're left to do is go back and argue two different sets of discovery that they never even moved on, and the second of which was intended to cure the dispute over the first and resulted in their receiving this data early.

THE COURT: Just so I'll understand, are you saying that after the response that we just saw to request for production number 5 wherein you objected that it was not the appropriate stage, they, on April 19, submitted a -- a further perhaps more narrowed request for

that information which you then responded to?

MR. SCALIA: That's exactly what happened, Your Honor. We provided our responses and objections, and this issue was quiet for a long period of time. Then on April 19th, we received simultaneously a letter, which Mr. Anderson referred to, and also new and far more specific requests. So, just to read some of them, request number 1: "All documents relating to the identity of each participant. Number 2" --

THE COURT: Well, you don't need to read that now.

MR. SCALIA: Okay.

THE COURT: Let me just ask Mr. Anderson.

Is it true that on April 19 you submitted a refined document request in the same vein as the requests that you showed me that were responded to on March 19?

MR. ANDERSON: Judge, we did in an effort to resolve their objection narrowed the requests that we made for information, but it was based upon their objection that it was premature. So we didn't -- we didn't give up on that. All we did is we say, well, for the time being, give us these documents that are responsive under the circumstances, but they still never produced any of the documents that their experts relied upon at any time until days, if not a week, after they

actually filed the reports.

THE COURT: It's my understanding that they produced them on or about May 18; is that right?

MR. ANDERSON: That -- so far as my recollection is concerned, Your Honor, if that's five or six days after the report was submitted, that is correct, Your Honor.

THE COURT: And that would be about 30 days after your -- your April 19 narrowed requests?

MR. ANDERSON: Yes, Your Honor.

THE COURT: So I... Under the circumstances, I don't see that history as providing a basis to strike those expert reports. I have not had an opportunity to determine the effect of those reports, and I'll keep in mind this -- this record as I'm determining that. And if there's some basis to provide relief, I'll -- I'll reconsider it at that time. But at this time, I'm going to deny the motion to strike the defendant's expert reports.

And, Mr. Anderson, if you've got something.

MR. ANDERSON: Yes, Your Honor.

THE COURT: Go ahead.

MR. ANDERSON: And I didn't mean to interrupt. But we also requested leave to continue -- partially continue the hearing on class certification so

that we can obtain discovery and submit a rebuttal expert under the circumstances, and I wanted the Court to consider that as well in its ruling.

THE COURT: Given how close we are to the hearing, I think what I'll do is just tell you that I'm going to deny that request at this time. But you can reurge that in the form of a motion to keep the record open at the close of the hearing, after I've had a chance to study the expert reports and have a better understanding of -- of the effect of them.

And, obviously, Mr. Scalia, I'm reserving to you all -- whatever your objections would be to that.

I'm not expressing an opinion one way or the other. I'm just going to say that I don't see the basis for that relief at this time, but I may understand it better next week. And you can reurge it if appropriate then.

I think you have heard, Mr. Scalia, what Mr. Anderson said about his expectations for the hearing, that he was intending to proceed on the papers. I do understand there's an issue about deposition designations that we'll get to. But setting that aside for a minute, if he proceeds in the way he just indicated, what is your intention regarding witnesses?

MR. SCALIA: We would not have witnesses

either. Now, that's on the understanding, of course, that the expert reports are material that would be considered by the Court. They are paper, they're before the Court, and we would argue those, but we wouldn't have witnesses live.

THE COURT: Okay. Let's turn back to the issue of depositions.

Mr. Anderson, you alluded to the possibility of offering depositions. Have you made a decision, and if so, I guess I -- I do think it's important that you let the defendants know in advance what portions of any depositions you're going to use so that they can make a decision about what, if any, other portions of those depositions they want to offer.

What do you say about that?

MR. ANDERSON: Your Honor, I totally understand that. We actually refer in our supplemental papers to motion for class certification. We allude to some deposition testimony. And so I think we just need to have a deadline of maybe Thursday to submit those to the defendants, give them an opportunity to at least know in advance what it is that we plan on submitting.

THE COURT: All right. If you make those known to the defendants by close of business Thursday.

Mr. Scalia, could you, by some time on

Monday, then respond with notice as to what portions of those depositions you wanted to offer, also?

MR. SCALIA: We could, Your Honor. Now, I understood initially from Mr. Anderson that they were simply going to use those deposition portions which are cited in the papers. So, if that's the case, we're good to go. We already know what they're using.

THE COURT: All right. Are there other portions besides those cited in your papers?

MR. ANDERSON: I think so, Judge.

THE COURT: Okay.

MR. ANDERSON: And so we'll review it and we'll give a full -- we'll set forth fully the excerpts that we plan to use. My intention was at the hearing that, depending on how the arguments are going, we may refer to the Court to certain deposition portions, and so it's a good exercise for us to get that together in advance, and we'll get that them by the close of day on Thursday.

THE COURT: All right. And I understand this is a tight schedule, but if we go with close of business Thursday, I would need you, Mr. Scalia, to make yours by, say, noon Monday so that they can have some notice before the hearing starts Tuesday morning.

Is that workable for you?

MR. SCALIA: Yes, we can make that.

THE COURT: Okay. Then we'll proceed in that fashion with depositions. And you should just come -- if you haven't already tendered those in the five boxes of courtesy copies that we got, come with -- with copies to tender to the Court at the hearing so that we'll have those then, Mr. Scalia.

MR. ANDERSON: Judge, do you want us to file those on Thursday?

THE COURT: I -- the other exhibits that you're planning to offer at the hearing, have those been E-filed?

MR. ANDERSON: I don't believe so. We have identified them, but we have not actually given you copies of them.

THE COURT: Well, then let's treat them all the same way so that on Tuesday we'll have a bundle, whatever size it would be, of your exhibits and we can -- I -- we're going to want to have those in electronic format for the record, but for purposes of my use of them, I'm -- I'm happy to have a paper copy.

MR. ANDERSON: So we'll -- we'll submit them to you on a CD as well as in paper form?

THE COURT: I'm not going to try -- yes. I'm not going to try and have those read before the

hearing; so, you don't need to get them to me before the hearing. I just want your adversary to have notice of that in advance, that you can bring all those exhibits with you to the hearing, and we'll put them in the record, one paper copy and an electronic disc as well.

MR. ANDERSON: Yes, sir.

MR. SCALIA: It is 180 different documents, I believe.

I don't know, Mr. Anderson, if it's possible to pare that down. We can try to do the same in advance of the hearing.

MR. ANDERSON: Obviously, we'll try to do that.

THE COURT: The Court will be able to pay closer attention to a smaller number of documents, so I would -- I would ask that you do that to the extent possible.

And, Mr. Scalia, do you have other questions about how we're going to proceed on Tuesday?

MR. SCALIA: No, Your Honor.

THE COURT: Okay.

MR. SCALIA: I did want to clarify one thing for the record. When I spoke earlier on the motion to compel, I said that I thought a certain statement had been made by Mr. Eddingston in his deposition but I wasn't

a hundred percent sure and I would check. I did not have that quite right and I just wanted to let you know that I checked with my colleague and the statement I represented, he -- it's not exactly what he said; so, I just wanted to clarify that in the record since I told you I would double check.

THE COURT: All right. Well, thank you for doing that.

Anything else that we need to take up today?

MR. ANDERSON: No, Your Honor.

MR. SCALIA: My esteemed colleague, Mr. Smith, suggests that we ask you how long you expect the hearing to be on next Tuesday.

THE COURT: If -- if what we're talking about is putting the exhibits in and then hearing oral argument, I would expect that we'll be done by noon. That would be my expectation. We're starting at 10:00; is that -- or is it at --

MR. SCALIA: 9:00.

THE COURT: -- 9:00? Well, then we should be done well before then. But that -- really, I want to give you an opportunity to present your arguments in the way you think is most effective; so, I'll -- I'll be at your disposal in that regard.

All right. Well, thank you, and we are adjourned.

(Hearing adjourned.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

May 31, 2013

JILL E. McFADDEN
Deputy Official Reporter
State of Texas No.: 3392
Expiration Date: 12/31/14

Job No. 110098